

SUPPORTING STATEMENT
TD 9704
(OMB# 1545-1487)

1. CIRCUMSTANCES NECESSITATING COLLECTION OF INFORMATION

Section 367(e)(1) provides that a domestic corporation will recognize gain on section 355 distributions of stock or securities to foreign persons, to the extent provided in regulations. Section 367(e)(2) provides that sections 337(a) and (b) (1) will not apply to a domestic corporation's section 332 distributions to a foreign parent corporation that owns 80 percent of the domestic liquidating corporation as described in section 337(c). Section 6038B(a) requires a U.S. person who transfers property to a foreign corporation in an exchange described in sections 332 and 355 to furnish the Secretary of the Treasury with information with respect to the transfer, to the extent and manner provided in regulations.

The final regulations under section 367(e)(1) require gain recognition only for distributions of the stock or securities of foreign corporations to foreign persons. The final regulations under section 367(e)(2) generally require gain recognition when a domestic corporation liquidates into its foreign parent corporation and do not require gain recognition when a foreign corporation liquidates into its foreign parent corporation.

TD 9704 contains final and temporary regulations relating to the consequences to U.S. and foreign persons for failing to file gain recognition agreements (GRAs) or related documents, or to satisfy other reporting obligations, associated with certain transfers of property to foreign corporations in nonrecognition exchanges. The regulations are necessary to update and clarify the rules that apply when a U.S. or foreign person fails to file a GRA or related documents or to satisfy other reporting obligations. These regulations affect U.S. and foreign persons that transfer property to foreign corporations in nonrecognition exchanges.

2. USE OF DATA

The data collected under section 367(e)(1) will be used by the Internal Revenue Service to determine whether a taxpayer has correctly calculated its tax liability under section 367(e)(1). The data collected under section 367(e)(2) will be used by the Internal Revenue Service to determine whether a taxpayer is properly claiming an exemption from taxation. The information collected by under section 6038B will be used by the Internal Revenue Service to identify assets that have been transferred outside the U.S. taxing jurisdiction. TD 9704 explains the procedures for establishing that a failure to comply was not willful. The information in 1.6038B-1 explains how a taxpayer may submit a request for relief from the penalty.

3. USE OF IMPROVED INFORMATION TECHNOLOGY TO REDUCE BURDEN

IRS Publications, Regulations, Notices and Letters are to be electronically enabled on an as practicable basis in accordance with the IRS Reform and Restructuring Act of 1998.

The IRS has attempted to provide taxpayers with the easiest way to make this regulatory requirement to include a justification statement with the amended return as simple and expedient as possible.

4. EFFORTS TO IDENTIFY DUPLICATION

We have attempted to eliminate duplication within the agency wherever possible.

5. METHODS TO MINIMIZE BURDEN ON SMALL BUSINESSES OR OTHER SMALL ENTITIES

There are no small entities affected by this collection.

6. CONSEQUENCES OF LESS FREQUENT COLLECTION ON FEDERAL PROGRAMS OR POLICY ACTIVITIES

Consequences of less frequent collection on federal programs or policy activities could consist of a decreased amount of taxes collected by the Service, inaccurate and untimely filing of tax returns, and an increase in tax violations. Failure to provide the justification statement and amended return timely, will create inconsistencies in the ability for taxpayers and IRS to comply with the tax laws.

7. SPECIAL CIRCUMSTANCES REQUIRING DATA COLLECTION TO BE INCONSISTENT WITH GUIDELINES IN 5 CFR 1320.5(d)(2)

There are no special circumstances requiring data collection to be inconsistent with guidelines in 5 CFR 1320.5(d)(2).

8. CONSULTATION WITH INDIVIDUALS OUTSIDE OF THE AGENCY ON AVAILABILITY OF DATA, FREQUENCY OF COLLECTION, CLARITY OF INSTRUCTIONS AND FORMS, AND DATA ELEMENTS

On January 16, 1990, temporary regulations under section 367(e)(1) and 367(e)(2) were published in the **Federal Register** (55 FR 1406 [TD 8280, 1990-1 C.B. 80]). A cross-referenced Notice of Proposed Rulemaking was published on that same date (55 FR 1472 [1990-1 C.B. 678]). On January 25, 1993, final regulations under section 367(e)(1) were published in the **Federal Register** (58 FR 5927 [TD 8472, 1993-1 C.B. 51]). The final regulations under section 367(e)

(1) were removed and replaced with temporary regulations that were published in the **Federal Register** on August 14, 1996 (61 FR 42165 [TD 8682, 1996-2 C.B. 12]). A cross-referenced Notice of Proposed Rulemaking was published on August 14, 1996 (61 FR 42217).

Comments were received with respect to the 1990 Notice of Proposed Rulemaking concerning sections 367(e)(1) and 367(e)(2). No significant comments were received with respect to the 1996 Notice of Proposed Rulemaking concerning section 367(e)(1). No hearings were held on either Notice of Proposed Rulemaking.

Commentators to the 1990 Notice of Proposed Rulemaking suggested that distributions of the stock or securities of domestic corporations should not be subject to gain recognition under section 367(e)(1). Although the 1993 final regulations under section 367(e)(1) and the 1996 temporary regulations under section 367(e)(1) did not adopt this comment, the 1999 final regulations under section 367(e)(1) adopt the comment and do not require gain recognition when a domestic corporation makes a section 355 distribution of stock or securities of another domestic corporation to foreign persons.

Neither of the Notices of Proposed Rulemaking included any information collection burden associated with section 6038B.

The final regulations under sections 367(e)(1) and 367(e)(2) and the amendments to the temporary regulations under section 6038B were published with paperwork requirements in the Federal Register on August 9, 1999(65 FR 43072).

On January 31, 2013, the IRS and the Department of the Treasury (Treasury Department) published a notice of proposed rulemaking (REG-140649-11) in the Federal Register (78 FR 6772-01) under sections 367 and 6038B of the Internal Revenue Code (Code) (proposed regulations) relating to the consequences to U.S. and foreign persons for failing to file GRAs or related documents, or to satisfy other reporting obligations, associated with certain transfers of property to foreign corporations in nonrecognition exchanges. No public hearing was requested or held.

After consideration of all the comments, the proposed regulations were adopted as amended in TD 9704. In addition, Treasury decision 9704 also amended and removed a portion of the temporary §§ 1.367(a)-3 and 1.367(a)-7 regulations that were published on March 19, 2013 (T.D. 9615, 2013-1 C.B. 1026).

The summary of comments and explanation of revisions were included in TD 9704. A sample of the responses are below:

“1. Satisfaction of Section 6038B Reporting if a GRA Is Filed

The proposed regulations under section 6038B require a U.S. person that transfers property (U.S. transferor) to file a Form 926, Return by a U.S. Transferor of Property to a Foreign Corporation, with respect to a transfer of stock or securities in all cases in which a GRA is filed in order to avoid penalties under section 6038B.

However, the proposed regulations do not require the U.S. transferor to report on the Form 926 any specific information regarding the transferred stock or

securities. The IRS and the Treasury Department have determined that, similar to the information that must be provided for other types of transferred property, the U.S. transferor should report on the Form 926 the fair market value, adjusted tax basis, and gain recognized with respect to the transferred stock or securities, as well as any other information that Form 926, its accompanying instructions, or other applicable guidance require to be submitted with respect to the transfer of the stock or securities. Section 1.6038B– 1(b)(2)(iv) of these final regulations is thus modified accordingly.

2. Application to Previously Filed Requests

The proposed regulations under § 1.367(a)–8(p) only apply to requests for relief submitted on or after the date the proposed regulations are adopted as final regulations. One comment requested that these final regulations permit U.S. transferors to request relief under § 1.367(a)–8(p) of the proposed regulations for certain failures to file a GRA document or comply with the GRA provisions that are the subject of requests for relief submitted before the date the proposed regulations are finalized.

According to the commentator, not permitting U.S. transferors to do so could result in disparate treatment for similarly situated U.S. transferors. The IRS and the Treasury Department have determined that it is appropriate to provide relief for certain failures to file or to comply that were not willful and that were the subject of requests for relief submitted under § 1.367(a)–8(p) of the existing final regulations (or submitted under § 1.367(a)–8T(e)(10), as contained in 26 CFR part 1 revised as of April 1, 2008, or § 1.367(a)–8(c)(2), as contained in 26 CFR part 1 revised as of April 1, 2006) before November 19, 2014 (previously filed requests). Accordingly, § 1.367(a)–8(r)(3) of these final regulations provides a procedure under which U.S. transferors may resubmit certain previously filed requests (including requests that were denied).

By submitting a previously filed request under this procedure, a U.S. transferor agrees that these final regulations under § 1.6038B–1 will apply to any transfer that is the subject of the request. This is intended to provide parity between similarly situated U.S. transferors and promote the policies underlying the proposed regulations by ensuring that a U.S. transferor that establishes its failure was not willful under § 1.367(a)–8(p) is still subject to penalties under section 6038B if its failure was not due to reasonable cause.

3. Promptly Filing an Amended Return as a Requirement to Seeking Relief

One comment was received regarding the procedures described in § 1.367(a)–8(p)(2) of the proposed regulations for establishing that failures to file GRA documents, or failures to comply, were not willful. The comment requested that these final regulations excuse Coordinated Industry Case (CIC) taxpayers from the requirement under § 1.367(a)–8(p)(2) of filing an amended return promptly after discovering a failure to file or a failure to comply.

Instead, the commentator suggested that these final regulations allow CIC taxpayers to submit the materials required under § 1.367(a)–8(p)(2) when the taxpayers effect a “qualified amended return” under Rev. Proc. 94–69, 1994–2 CB 804 (generally providing special procedures for certain taxpayers to show additional tax due or make adequate disclosure with respect to an item or position on a tax return prior to an audit).

According to the commentator, it is possible that an amended return filed to correct the failure to file or failure to comply will differ from the return that is ultimately audited when the taxpayer effects a qualified amended return under Rev. Proc. 94–69. The commentator stated that this could result in an inefficient use of resources in situations in which a CIC taxpayer, when preparing the amended return, includes not only adjustments related to the failure to file or failure to comply, but also all other adjustments as to which the taxpayer is aware.

The IRS and the Treasury Department decline to adopt this comment. The commentator’s concerns exist in other international contexts (for example, § 1.1503(d)–1(c)(2)), and it would be inappropriate to create differing procedures for requesting relief under different provisions. However, the IRS and the Treasury Department intend to study the issue.

4. Modifying the Reported Fair Market Value of Transferred Stock

One comment requested that these final regulations provide a mechanism under which taxpayers may modify the fair market value of transferred stock or securities reported on a previously filed GRA. According to the commentator, taxpayers often determine the fair market value of stock or securities before the date that the stock or securities are transferred to a foreign corporation; these determinations are based on projected financial information that may, in some cases, deviate from the actual financial information on the date of the transfer.

The IRS and the Treasury Department decline to adopt the comment. The IRS and the Treasury Department have determined that the proposed regulations adequately address the commentator's concerns. First, because a GRA is filed when a taxpayer files its tax return (rather than at the time of an outbound transfer of stock or securities), a taxpayer has, not including extensions, at least two and a half months following a transfer to reconcile projected financial information with actual financial information.

Furthermore, a taxpayer may file an extension if it needs additional time to comply with the requirements of § 1.367(a)–8. Finally, a taxpayer that fails to materially comply with the requirements of § 1.367(a)–8, including the requirement to include the fair market value of the transferred stock or securities in the GRA pursuant to § 1.367(a)–8(c)(3)(i)(B), may be eligible to correct the GRA by seeking relief based on a claim that the failure was not willful.

5. Extension of Relief for Failures That Are Not Willful to Other Section 367(a) Reporting Obligations

The IRS and the Treasury Department have determined that it is appropriate to extend the relief for failures that are not willful to certain other reporting obligations under section 367(a) that were not covered by the proposed regulations. This Treasury decision therefore revises § 1.367(a)–2 (providing an exception to gain recognition under section 367(a)(1) for assets transferred outbound for use in the active conduct of a trade or business outside of the United States) and § 1.367(a)–7 (regarding application of section 367(a) to an outbound transfer of assets by a domestic target corporation in an exchange described in section 361) so that a taxpayer may, solely for purposes of section 367(a), be deemed not to have failed to comply with reporting obligations under §§ 1.367(a)–2 and 1.367(a)–7 by demonstrating that the failure was not willful. The temporary § 1.367(a)–7 regulations regarding reasonable cause relief are therefore removed. Because the cases in which relief is sought under § 1.367(a)–2 and many of the cases in which relief is sought under § 1.367(a)–7 are also subject to reporting under section 6038B and the regulations thereunder, the penalty imposed under section 6038B for failure to satisfy a reporting obligation should generally be sufficient to encourage proper reporting and compliance.

6. Withdrawal of GRA Directive

On July 26, 2010, the Deputy Commissioner International (LMSB) issued directive LMSB–4–0510–017 (Directive). The Directive permits taxpayers to

remedy, without having to demonstrate reasonable cause, unfiled or deficient GRA documents associated with a timely filed initial GRA or a timely filed document purporting to be an initial GRA. The Directive explained that the means to best ensure compliance with the GRA provisions was under study and that, pending the study, the Directive would be effective “until further notice.” Because this Treasury decision provides comprehensive guidance that is designed to ensure compliance with the GRA provisions, the Deputy Commissioner (International), Large Business & International will revoke the Directive effective on November 19, 2014.

7. Including an Original Form 8838 With a Request for Relief

Under § 1.367(a)–8(p)(2)(i) of the proposed regulations, a U.S. transferor who seeks relief for a failure to file or failure to comply with the GRA rules must, among other requirements, file an original Form 8838, Consent to Extend the Time to Assess Tax Under Section 367—Gain Recognition Agreement, with an amended return. The Form 8838 must, with respect to the gain realized but not recognized on the initial transfer, extend the period of limitations on the assessment of tax to the period specified in § 1.367(a)–8(p)(2)(i) of the proposed regulations. The IRS and the Treasury Department recognize that in certain cases (for example, certain cases in which a U.S. transferor seeks relief for an unfiled annual certification), the U.S. transferor will already have filed an original Form 8838 that extends the period of limitations through the required time period. These final regulations therefore provide that, in these cases, a U.S. transferor need not file another Form 8838 with the amended return; rather, the U.S. transferor must attach a copy of the previously filed Form 8838 to the amended return. A similar modification is made to these final regulations under § 1.367(e)–2 concerning outbound liquidations and certain foreign-to-foreign liquidations described in section 332.

8. Failure To Comply and Extension of Period of Limitations

Section 1.367(a)–8(j)(8) of the existing regulations provides that a failure to comply with the GRA provisions will extend the period of limitations on assessment of tax until the close of the third full taxable year ending after the date on which the Director of Field Operations or Area Director receives actual notice of the failure to comply from the U.S. transferor. The same provision is included in the proposed regulations. Section 1.367(e)–2(e)(4)(ii)(B) of the

proposed regulations provides a similar rule with respect to a liquidation document.

The IRS and the Treasury Department have determined that the running of the extended period of limitations arising under §§ 1.367(a)–8(j)(8) and 1.367(e)–2(e)(4)(ii)(B) should be based on when the taxpayer furnishes to the Director of Field Operations International, Large Business & International (or any successor to the roles and responsibilities of such person) the information that should have been provided under the §§ 1.367(a)–8 or 1.367(e)–2 regulations, as applicable. Thus, in these final regulations, §§ 1.367(a)–8(j)(8) and 1.367(e)–2(e)(4)(ii)(B) are modified accordingly.

In addition, §§ 1.367(a)&8(c)(2)(iii), 1.367(e)–2(b)(2)(i)(C)(1), and 1.367(e)–2(b)(2)(iii)(D) of these final regulations are revised to clarify that when a taxpayer files a GRA under § 1.367(a)–8 or a liquidation document under § 1.367(e)–2, the taxpayer agrees to extend the period of limitations on assessment of tax, in the circumstances provided in §§ 1.367(a)–8(j)(8) and 1.367(e)–2(e)(4)(ii)(B), as applicable.

This agreement is deemed consented to and signed by the Secretary for purposes of section 6501(c)(4).

9. Reporting Requirement in § 1.367(a)–3(c)(6)(i)(F)(3)

Section 1.367(a)–3(a) of the existing final regulations provides the general rule that a U.S. person must recognize gain on certain transfers of stock or securities to a foreign corporation. In relevant part, § 1.367(a)–3(c) of the existing final regulations contains an exception for certain transfers of stock or securities of a domestic corporation.

Specifically, § 1.367(a)–3(c)(1) provides that, except as provided in § 1.367(a)–3(e) (providing rules for transfers of stock or securities by a domestic corporation to a foreign corporation pursuant to an exchange described in section 361), a transfer of stock or securities of a domestic corporation by a U.S. person to a foreign corporation that would otherwise be subject to gain recognition under section 367(a)(1) pursuant to § 1.367(a)–3(a) will not be subject to section 367(a)(1) if certain requirements are satisfied. In particular, the domestic corporation the stock or securities of which are transferred (referred to as the U.S. target company) must comply with each of the reporting requirements in § 1.367(a)–3(c)(6) and each of the four conditions set forth in § 1.367(a)–3(c)(1)(i) through (iv) must be satisfied. The condition set forth in § 1.367(a)–3(c)(1)(iv) requires that the active trade or business test (as defined in § 1.367(a)–3(c)(3))

be satisfied. To satisfy the active trade or business test, the substantiality test (as defined in § 1.367(a)–3(c)(3)(iii)) must be satisfied (among other requirements). The substantiality test is satisfied if, at the time of the transfer, the fair market value of the transferee foreign corporation is at least equal to the fair market value of the U.S. target company.

Pursuant to the reporting requirement contained in § 1.367(a)–3(c)(6)(i)(F)(3), the U.S. target company must submit a statement demonstrating that the value of the transferee foreign corporation exceeds the value of the U.S. target company on the acquisition date. The standard that applies for purposes of the reporting requirement of § 1.367(a)–3(c)(6)(i)(F)(3) is intended to be the same as the standard that applies for purposes of the substantiality test.

Accordingly, this Treasury decision revises § 1.367(a)–3(c)(6)(i)(F)(3) so that the U.S. target company must submit a statement demonstrating that the value of the transferee foreign corporation equals or exceeds the value of the U.S. target company on the acquisition date.”

We received no comments during the comment period in response to the Federal Register notice dated June 15, 2016 (81 FR 39105).

9. EXPLANATION OF DECISION TO PROVIDE ANY PAYMENT OR GIFT TO RESPONDENTS

No payment or gift has been provided to any respondents.

10. ASSURANCE OF CONFIDENTIALITY OF RESPONSES

Generally, tax returns and tax return information are confidential as required by 26 USC 6103.

11. JUSTIFICATION OF SENSITIVE QUESTIONS

A privacy impact assessment (PIA) has been conducted for information collected under this request as part of the “Business Master File (BMF)” system and a Privacy Act System of Records notice (SORN) has been issued for this system under IRS 24.046-Customer Account Data Engine Business Master File. The Internal Revenue Service PIAs can be found at <http://www.irs.gov/uac/Privacy-Impact-Assessments-PIA>.

Title 26 USC 6109 requires inclusion of identifying numbers in returns, statements, or other documents for securing proper identification of persons

required to make such returns, statements, or documents and is the authority for social security numbers (SSNs) in IRS systems.

12. ESTIMATED BURDEN OF INFORMATION COLLECTION

Section 1.367(a)-1(f)(2) requires non-publicly traded domestic corporations making section 355 distributions of the stock or securities of a foreign corporation to identify distributees who are U.S. persons and certify the amount of stock or securities distributed to the U.S. persons. We estimate that this requirement will affect 15 respondents per year and take 4 hours each, for a total of 60 hours.

Section 1.367(a)-8(p)(2) requires publicly traded domestic corporations making section 355 distributions of the stock or securities of a foreign corporation to provide a statistical analysis (conducted by an unrelated party) to infer an amount of stock or securities that were distributed to distributees who are U.S. persons, in order to rebut a presumption that all such stock or securities were distributed to foreign persons. We estimate that this requirement will affect 2 respondents per year and take 20 hours each, for a total of 40 hours.

Section 1.367(e)-2(f)(2) contains various collection and reporting requirements in order for domestic corporations to qualify for nonrecognition of gain attributable to property distributed to a foreign parent corporation in a complete liquidation of the domestic corporation. Section 1.367(e)-2(c)(2)(B) and (C) contain various collection and reporting requirements in order for foreign subsidiary corporations to qualify for nonrecognition of gain attributable to the distribution of property used in a U.S. trade or business to a foreign parent corporation in a complete liquidation of the foreign subsidiary corporation. We estimate that the requirements contained in §§ 1.367(e)-2(b)(2) and 1.367(e)-2(c)(2)(B) and (C) will affect 100 respondents per year and take 16 hours each, for a total of 1,600 hours.

Section 1.6038B-1(c)(4)iii requires a domestic corporation making a section 355 distribution of stock or securities of a foreign corporation to foreign persons to file a Form 926 with an added addendum describing the distributions to foreign persons. We estimate that the requirements contained in § 1.6038B-1(e)(3) will affect 17 respondents per year and take 3 hours each, for a total of 51 hours.

Section 1.6038B-1(e)(4) requires domestic corporations making distributions of property to a foreign parent corporation in complete liquidation of the domestic corporation to file a Form 926 and identify thereon the property distributed to the foreign parent corporation. We estimate that the requirements contained in § 1.6038B-1(e)(4) will affect 180 respondents per year and take 4 hours each, for

a total of 720 hours.

Thus, the total burden under OMB #1545-1487 (TD 9704) is 2,471 hours with 414 respondents (5.98 hours per respondent).

Estimates of the annualized cost to respondents for the hour burdens shown are not available at this time.

13. ESTIMATED TOTAL ANNUAL COST BURDEN TO RESPONDENTS

There are no start-up costs associated with this collection.

14. ESTIMATED ANNUALIZED COST TO THE FEDERAL GOVERNMENT

There is no estimated annualized cost to the federal government.

15. REASONS FOR CHANGE IN BURDEN

There is no change in the paperwork burden previously approved by OMB. We are making this submission reinstate a previously approved collection.

16. PLANS FOR TABULATION, STATISTICAL ANALYSIS AND PUBLICATION

There are no plans for tabulation, statistical analysis and publication.

17. REASONS WHY DISPLAYING THE OMB EXPIRATION DATE IS INAPPROPRIATE

We believe that displaying the OMB expiration date is inappropriate because it could cause confusion by leading taxpayers to believe that the regulation sunsets as of the expiration date. Taxpayers are not likely to be aware that the Service intends to request renewal of the OMB approval and obtain a new expiration date before the old one expires.

18. EXCEPTIONS TO THE CERTIFICATION STATEMENT

There are no exceptions to the certification statement.

Note: The following paragraph applies to all of the collections of information in this submission:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.